Supreme Court, U.S.
FILED
07-195 AUG 13 2007
OFFICE OF THE CLERK

NO. _____

In The

SUPREME COURT OF THE UNITED STATES

HAGOP VARTANIAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT J. WATERS
Counsel of Record
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Christensen, Glaser, Fink, Jacobs,
Weil & Shapiro, LLP
ROBERT L. SHAPIRO
10250 Constellation Blvd., 19th Fl.
Los Angeles, California 90067
(310) 556-7886

Counsel for Petitioner
HAGOP VARTANIAN

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a defendant's right to a unanimous verdict by an impartial jury required by the Due Process Clause of the Fifth Amendment and the Sixth Amendment is violated when the district court dismisses a "holdout" juror for misconduct without considering whether the complaints about the juror were triggered by the juror's view of the merits?

(2) Whether it is plain error, that seriously affects the fairness, integrity or public reputation of judicial proceedings, to fail to instruct as to the element of subscribing to a false tax return that a defendant acted with the specific intent to violate a known legal duty?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

OPINIONS BELOW 1

BASIS OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND FACTS 2

REASONS FOR GRANTING THE WRIT 3

I. Certiorari Should Be Granted to Determine Whether a Defendant's Right to a Unanimous Verdict by an Impartial Jury Is Violated When the District Court Dismisses a Juror for Misconduct Without Considering Whether the Complaints about the Juror Were Triggered by the Juror's View of the Merits 3

II. Certiorari Should Be Granted to Determine Whether it Is Plain Error That Seriously Affects the Fairness, Integrity or Public Reputation of Judicial Proceedings to Fail to Instruct as to the Element of Subscribing to a False Tax Return That a Defendant Acted with the Specific Intent to Violate a Known Legal Duty 16

CONCLUSION 26

INDEX TO APPENDICES

APPENDIX A A-1
Opinion of Ninth Circuit. Reported at
476 F.3d 1095. Filed February 28, 2007.

APPENDIX B B-1
Ninth Circuit Unpublished Memorandum.
Filed February 28, 2007.

APPENDIX C C-1
Ninth Circuit Order denying petition for rehearing
en banc. Filed May 15, 2007.

APPENDIX D D-1
United States Constitution, Fifth Amendment
and Sixth Amendment; and 26 U.S.C. § 7206.

TABLE OF AUTHORITIES

Cases — Page

Apodaca v. Oregon,
406 U.S. 404 (1972) 5

Carella v. California,
491 U.S. 263 (1989) 22

Johnson v. United States,
520 U.S. 461 (1997) 23

Neder v. United States,
527 U.S. 1 (1999) 22, 23

Perez v. Marshall,
119 F.3d 1422 (9th Cir. 1997) 12

Ristaino v. Ross,
424 U.S. 589 (1976) 5

Sanders v. Lamarque,
357 F.3d 943 (9th Cir. 2004) 4

Sheppard v. Maxwell,
384 U.S. 333 (1966) 5

United States v. Alferahin,
433 F.3d 1148 (9th Cir. 2006) 21

United States v. Barone,
114 F.3d 1284 (1st Cir. 1997) 6

United States v. Boone,
458 F.3d 321 (3rd Cir. 2006) 6

United States v. Bishop,
412 U.S. 346 (1973) 19

United States v. Brooksby,
668 F.2d 1102 (9th Cir. 1982) 19

United States v. Brown,
823 F.2d 591 (D.C. Cir. 1987) 4, 6

United States v. Cheek,
498 U.S. 192 (1991) 19

United States v. Cotton,
535 U.S. 625 (2002) 23

United States v. Edwards,
303 F.3d 606 (5th ir. 2002) 6

United States v. Hernandez,
862 F.2d 17 (2nd Cir. 1988) 4

United States v. Olano,
507 U.S. 725 (1993) 21

United States v. Pompiano,
429 U.S. 10 (1976) 19

United States v. Rogers,
18 F.3d 265 (4th Cir. 1994) 22

United States v. Scholl,
166 F.3d 964 (9th Cir. 1999) 19, 25

United States v. Stansfield,
101 F.3d 909 (3rd Cir. 1996) 22

United States v. Stratton,
779 F.2d 820 (2nd Cir.1985) 4

United States v. Symington,
195 F.3d 1080 (9th Cir. 1999) 4, 5, 11, 15, 16

United States v. Thomas,
116 F.3d 606 (2nd Cir. 1997) 4, 6

In re Winship,
397 U.S. 358 (1970) 22

CONSTITUTION AND STATUTES

U.S. Const. art. III, § 2, cl. 3 5

U.S. Const. amend V 3, 26

U.S. Const. amend VI 3, 5, 26

26 U.S.C. § 7206 ..... passim

18 U.S.C. § 1014 1

28 U.S.C. §1254(1) 1

28 U.S.C. § 1291 2

18 U.S.C. § 2 1

18 U.S.C. § 3231 2

Fed. R. Crim. P. 23(b) 3, 4

Fed. R. Crim. P. 31(a) 5

Fed.R.Crim.P. 52(b) 21

OPINIONS BELOW

On February 28, 2007, by an Opinion reported at 476 F.3d 1095 (9th Cir. 2007), the United States Court of Appeals for the Ninth Circuit affirmed petitioner's conviction for aiding and abetting the filing of a false tax return, in violation of 18 U.S.C. § 2 and 26 U.S.C. § 7206(1), and aiding and abetting the making of false statements on a loan application, in violation of 18 U.S.C. § 2 and 18 U.S.C. § 1014. The Ninth Circuit rejected petitioner's claim that the district court abused its discretion when it dismissed a "holdout" juror from service during deliberations. The Opinion appears in Appendix A to this Petition. The Ninth Circuit also addressed petitioner's claims regarding jury instructions and the exclusion of witness testimony in an unpublished disposition filed February 28, 2007. The unpublished Memorandum appears in Appendix B to this Petition. On May 15, 2007, the United States Court of Appeals for the Ninth Circuit denied petitioner's timely petition for rehearing *en banc*, which appears in Appendix C.

BASIS OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied petitioner's appeal from his conviction on February 28, 2007 and his petition for rehearing *en banc* was denied on May 25, 2007. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment and Sixth Amendment; and 26 U.S.C. § 7206; are all set forth in Appendix D.

STATEMENT OF THE CASE AND FACTS

In November 2001, a grand jury returned an indictment charging petitioner with understating the income from his auto sales business, Pacific Sales & Leasing, on his 1994 and 1995 tax returns; with deliberately omitting income from his business, Muscles-N-Motion; and with deliberately omitting income from his illegal bookmaking business. The indictment also charged petitioner with knowingly making false statements on his 1993 and 1994 tax return for the purpose of obtaining a car loan.

Petitioner's trial began in February 2003, and the jury began deliberations in March 2003. On the second day of deliberations, the trial judge received a note from the jury foreperson concerning the purported misconduct of one of the jurors. After conducting hearings on the allegation, the juror was dismissed and replaced with an alternate. After two more days of deliberation, the jury found Petitioner guilty on all counts. The court pronounced judgment and sentenced petitioner to 15 months in prison and ordered a $10,000 fine.

The district court had jurisdiction under 18 U.S.C. § 3231. Petitioner timely appealed his conviction to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1291, which affirmed his conviction in its Opinion and in a

separate Memorandum also issued on February 28, 2007. See Appendices A and B. In response to petitioner's claim that the district court had improperly dismissed a juror during deliberations, the Ninth Circuit concluded the dismissal was justified in light of the juror's purported misconduct. App. A, p. A-8, 476 F.3d at 1099. In its unpublished Memorandum, the Ninth Circuit decided that the omission of the willfulness element from the jury instructions on the tax counts was not plain error. App. B, p. B-2.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Determine Whether a Defendant's Right Under the Due Process Clause of the Fifth Amendment and the Sixth Amendment to a Unanimous Verdict by an Impartial Jury Is Violated When the District Court Dismisses a Juror for Misconduct Without Considering Whether the Complaints about the Juror Were Triggered by the Juror's View of the Merits.

Petitioner asks this Court to articulate and apply the "good cause" standard, after the jury has retired to consider its verdict, for dismissing from service a probable "holdout" juror, an important question of federal law that has not been, but should be, settled by this Court and to resolve the conflict between the circuits on this important constitutional question.

Federal Rules of Criminal Procedure, Rule 23(b) provides that "[a]fter the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror." Fed. R. Crim. P. 23(b).

> contained false information as to a material matter. And, second, the return contained a written declaration that it was being signed subject to the penalties of perjury. And third, in filing false return, the defendant acted *wilfully*.
>
> . . .The term "wilfully" is included in the instructions. *An act is done wilfully if it is done knowingly and intentionally and not through ignorance, mistake or accident.*

(RT 1597) (Emphasis added.) The district court also instructed that:

> The good faith of the defendant, Jack Vartanian, is a complete defense to the tax charges in Count 1 and Count 2 of the superceding indictment because good faith is simply inconsistent with wilfully making and subscribing to a false tax return.
>
> While the term "good faith" has no precise definition, it means, among other things, an honest belief, a lack of malice, and the intent to perform all legal obligations.
>
> A person who acts on a belief or on an opinion honestly held is not punishable under this statute merely because that honest belief turns out to be incorrect or wrong.
>
> The tax laws are subject to [sic] criminal punishment only for those people who wilfully make and subscribe to false tax returns. If a person acts without

"Good cause"[1/] encompasses all those situations in which jurors are "no longer capable of rendering an impartial verdict" or "unable to perform their duties properly." *United States v. Thomas,* 116 F.3d 606, 613 (2nd Cir. 1997) Special care must be taken, however, when the juror at issue is a "holdout" juror. Although that status may not alone immunize a juror from a Rule 23 dismissal, "removal of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized." *United States v. Hernandez,* 862 F.2d 17, 23 (2nd Cir. 1988) "Removal of a holdout juror is the ultimate form of coercion." *Sanders v. Lamarque,* 357 F.3d 943 (9th Cir. 2004).

A district court, consequently, has an obligation to protect a holdout juror from fellow jurors who believe the holdout juror is acting lawlessly. *Compare United States v. Stratton,* 779 F.2d 820, 832 (2nd Cir.1985) (affirming juror's dismissal because record did not reveal "slightest basis" to believe that removed juror was a holdout). "Rule 23(b) is not available when the record evidence discloses a possibility that the juror believes that the government has failed to present sufficient evidence to support a conviction." *United States v. Brown,* 823 F.2d 591, 597 (D.C. Cir. 1987).

Although a district court clearly has the discretion to dismiss a juror for good cause once deliberations have begun, this discretion "is not unbounded." *United States v. Symington,* 195 F.3d 1080, 1085 (9th Cir. 1999). The primary

---

[1/] The 2002 Amendment to Rule 23(b) replaced the term "just cause" with the more familiar term "good cause," that appears in other rules. *See* Advisory Committee Notes, 2002 Amendments to Fed. R. Crim. P. 23.

limitation on a district court's exercise of that discretion is a criminal defendant's constitutional right to a unanimous verdict by an impartial jury. *Id.*[2/]

In *Symington,* the Ninth Circuit asked the question, "how likely must it be that a juror's views on the merits underlies the request for her removal, before the district court is precluded from removing the juror?" *Symington,* 195 F.3d at 1086. The Ninth Circuit answered: "We hold that if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Id.* at 1087 (emphasis in original) In other words, "unless the available evidence is sufficient to leave one firmly convinced that the impetus for a juror's dismissal is unrelated to her position on the merits, the dismissal is improper." *Id.* at 1087, n.5.

[2/] *See* U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."); U.S. Const. art. III, § 2, cl. 3 ("The trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."). In *Apodaca v. Oregon,* 406 U.S. 404, 92 S.Ct. 1628 (1972), five members of this Court interpreted the Sixth Amendment to endow a federal criminal defendant with the right to a unanimous verdict. *See* 406 U.S. at 369-71, 92 S.Ct. at 1637 (Powell, J., concurring); *id.* at 382, 92 S.Ct. at 1644 (Douglas, J., dissenting); *id.* at 395, 92 S.Ct. at 1650 (Brennan, J., dissenting); *id.* at 400, 92 S.Ct. at 1652 (Marshall, J., dissenting); *id.* at 414, 92 S.Ct. at 1634 (Stewart, J., dissenting). In addition, Rule 31(a) of the Federal Rules of Criminal Procedure echos the constitutional requirement of unanimity, stating "[t]he verdict shall be unanimous." *See also Ristaino v. Ross,* 424 U.S. 589, 595 n.6 (1976)(stating that criminal defendant's right to an impartial jury derives from both the Sixth Amendment and principles of due process); *Sheppard v. Maxwell,* 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences.").

In using a reasonable possibility standard, the Ninth Circuit split with the Unites Stated Court of Appeals for the Second and the District of Columbia Circuits. In *Brown*, the D.C. Circuit held "that if the record evidence discloses any possibility that the [juror's] request to [be] discharged stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." 823 F.2d at 596. Ten years later, in *Thomas*, the Second Circuit "adopted the *Brown* rule as an appropriate limitation on a juror's dismissal in any case where the juror allegedly refuses to follow the law." 116 F.3d at 622.

In *Symington*, the Ninth Circuit adopted a different standard on this important federal question. After considering *Brown* and *Thomas*, the Ninth Circuit held "that if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Symington*, 195 F.3d at 1087. The Ninth Circuit "emphasized that the standard is any reasonable possibility, not any possibility whatever" and noted that "anything is possible in a world of quantum mechanics." *Id.* at 1087 n. 5. Accordingly, this Court should resolve the split between the circuits [3/] and apply the standard for good cause, to excuse a

---

[3/] *Compare*, *United States v. Boone*, 458 F3d 321, 329 & fn. 4 (3rd Cir. 2006)("Our focus here is solely on a district court's authority to investigate allegations of jury misconduct....[w]e do not consider the question directly at issue in *Brown*, *Thomas*,...and *Symington*--the quantum of evidence required for the *dismissal* of a juror based on jury nullification or refusal to deliberate."); *United States v. Edwards*, 303 F.3d 606, 632-33 (5th Cir. 2002)(discussing and distinguishing *Brown*, *Thomas* and *Symington*); *United States v. Barone*, 114 F.3d 1284, 1308-09 (1st Cir. 1997)(citing and distinguishing *Brown*.)

possible holdout juror after the jury has retired to deliberate, to the district court's dismissal of the holdout juror in petitioner's case.

A. Facts Relating to the Dismissal of Juror No. 7

1. The Inquiry into Purported Jury Misconduct

On at least eight occasions during trial and prior to deliberations, including during pre-instructions, the district court admonished the jurors not to discuss the case among themselves or with anyone else.[4/] On Friday, March 14, 2003, the second day of deliberations, the trial judge informed counsel that it had received on that date the following note signed by the jury foreman:

> There is one juror that has been seen on different occasions speaking to the defendant's family. Juror's name is Kathy. Three or four people have seen her and two saw her this morning chatting with them outside the courtroom.

[4/] Every iteration repeated the same fundamental notions:

> Please remember my admonitions. *Do not discuss the case* among yourselves or with anybody else. Do not form or express any opinion *about the case* until it's finally submitted to you. Please do not let yourself be exposed to, do not read, listen to, or otherwise observe any media account *about the case*. Please do not do any investigation or inquiry *about the case*.

(Reporter's Transcript ["RT"] 428; *see also* RT 194, 198, 678-49, 858, 1133, 1392, 1500, 1796) (Emphasis added)

(Excerpts of Record ["ER"] 55-56) Though the trial judge's repeated admonition had prohibited only contacts involving discussions *about the case*, the judge responded to the foreman's note by immediately stating, "I don't know how I could have made it any clearer to the jurors that they weren't to communicate with anybody. . . ." (ER 56; *see also* ER 90 (trial judge states, "I will go back to my original statement, and that is how any juror could have not known that they weren't to do these things that it appears that [Juror 7] has been doing is beyond my comprehension."))

In the wake of the foreman's complaint, the district court conducted a hearing in which he questioned all of the jurors, including Juror No. 7, also identified as Catherine L. The general outline of that hearing is described in the Ninth Circuit's published opinion, 476 F.3d at 1096-97, App. A, A-3--A-5. Essentially, several jurors alleged that Catherine L. had engaged in a number of contacts with persons associated with the case, including members of defendant's family. *Id.*

2. Evidence that Other Jurors Complained About Juror No. 7 Based on Her View of the Merits

Significantly, as described by the Ninth Circuit, none of the statements other jurors attributed to Catherine L. demonstrated that she had ever discussed the *merits* of the case with anyone outside the courtroom. 476 F.3d at 1096-97, App. A, A-3--A-5.

Furthermore, during its inquiry into Catherine L.'s purported misconduct, two jurors spontaneously provided information indicating that the complaints concerning

Catherine L's contacts were likely motivated by resentment towards Catherine L's status as a "holdout" juror for defendant and her views on the merits.

Thus, when the trial judge was questioning the jury foreman about Catherine L.'s conduct, the foreman volunteered, "*One personal concern that I have. We did a mock survey as to where each person stands.*" (ER 74) The district court tried to forestall this line of comment from the foreman, but the latter still stated, "*[I]t's related to that person [Catherine L.] again,*" and inquired, "*Is having an open mind part of the requirements of deliberating*?" At that juncture, the Court impressed upon the foreman the need to refrain from touching on the deliberative process. (ER 74)

Another juror, Sally P., also told the trial judge what she knew of Catherine L.'s purported contacts. (ER 85-86) While describing these contacts, Sally P. complained about Catherine L.'s conduct inside the jury room: "*And then yesterday when we went to deliberations, she said that he was not guilty and nobody can change ...*", at which point the court stated, "no you can't tell us that." (ER 86) Asked shortly thereafter whether her having seen Catherine L's contacts had influenced or affected her, Sally replied, "*I think the jury is going to be hung up.*" (ER 87) The Court then admonished her not to divulge anything about the jury's votes. (*Id.*)

3. The Trial Court's Ruling

After concluding its inquiry, the trial court ultimately ruled that Catherine L. should be dismissed as a juror. Two

features of the court's underlying findings — or absence thereof — bear emphasis.

First, the district court made it clear that a key basis for its dismissal order was Catherine L.'s "serious and egregious" violations of an instruction on a jury tape played for jurors *prior* to trial that was "covered in voir dire . . . in preinstruction . . . and . . . in a daily admonition to jurors that they were not to talk to anybody about the case . . . that they were not to allow anyone to contact them or for them to have any contact of any kind whatsoever . . ." (ER 172-73) The district court said Catherine L. had, on at least five different occasions "categorically violated" the "rule not to contact or communicate with anybody associated with the case." (*Id.*)

Second, the district court expressly stated that it had *not* factored into its findings what it had heard about Catherine L.'s expressed views of the case. (ER 147-48) ("I'm not going to give, for this purpose, any weight to that because it is improper to do so under *Symington*, and I will not do so. . . . It can't be considered."). In a subsequent session, the court stated that while it had attempted to conduct its inquiries in a nonsuggestive and nonprejudicial manner, the fact that "one juror" spontaneously spoke out as to an alleged statement made by the juror in question was "neither invited nor intended," and would not be considered by the court in its decision. The court commented that the statement "didn't express any thought by the particular juror who was reporting on it, but rather the alleged view of the juror who made the statement . . . " (ER 171; *see also* 476 F.3d at 1099 [Ninth Circuit approves district court's decision to disregard remarks concerning Catherine L's position concerning case as stated during deliberations])

B. The District Court's Finding of Misconduct was Based on a Clearly Erroneous Factual Finding

As a preliminary matter, petitioner contends that the district court's stated "misconduct" rationale cannot withstand scrutiny as a factual matter, and the Ninth Circuit's opinion is misguided in suggesting otherwise.

Again, a trial court abuses its discretion in dismissing a juror in any circumstance where the dismissal order rests on clearly erroneous findings of fact. *Symington*, 195 F.3d at 1085. Such clear error appears here. As noted, the primary ground for dismissal and that which provoked the district court's most fervent statements of outrage was Catherine L.'s "categorical" violations of the court's supposedly repeated admonition that jurors refrain from having any contact with anyone associated with the case. This characterization however, was factually baseless: the district court had never made clear that jurors could not do what Catherine was accused of doing, and there had been no significant violation of a court order at all, let alone a "flagrant" or "blatant" one.

The admonition which the trial judge repeatedly stated to jurors concerning their conduct while court was not in session prohibited only contacts with others *about the case*. (RT 194, 198, 428, 678-49, 858, 1133, 1392, 1500, 1796) Thus, what the district court could not have made any clearer was that the jurors were not permitted to discuss *the case*, *not* that they

were to have no contact whatsoever with individuals associated with one party or the other.[5/]

Here, *no* information revealed that Catherine L. had improperly discussed the case with anyone. Nothing indicated that she had received any extra-judicial information about the case. Nothing, moreover, indicated that she was *unable* to deliberate. *Compare Perez v. Marshall,* 119 F.3d 1422, 1427 (9th Cir. 1997) (finding no constitutional violation in trial court's dismissal of juror during deliberations who, because of emotional condition, was unable to continue deliberating).

Indeed, as far as the record reveals, if Catherine L. ever heard an admonition regarding not having any contact with anybody associated with the case — a question never asked her — it would have been on one occasion, when the district court's clerk played the indoctrination tape, quoted by the district court on May 17, 2003. That tape, of course, was not an order of the district court and was arguably superceded by the court's actual admonitions during trial. In any event, although Catherine L's contacts may have violated a single

---

[5/] The very first time that the court made *that* point clear to the jurors was *after* the dismissal of Catherine L., with an admonition that, in stark contrast to those given earlier, finally stated:

> . . . as you now separate from your deliberations and you will no longer be in the jury room, you must not discuss the case among yourselves or with anybody else. Don't have any kind of contact with anybody concerning the case. *Do not have any contact with anybody associated with the case, attorneys, parties, witnesses, friends, supporters, whatever it might be.*

RT 1819 (emphasis added).

admonition given the jurors in a pre-trial videotape, they did not violate the instructions, let alone repeated instructions, given jurors by the court itself. The Ninth Circuit's suggestion (476 F.3d at 1098-99 and n. 2, App. A, A-7--A-8) that the trial judge's factual error on this point may be brushed aside by considering the videotape alone, under these facts, is entirely unpersuasive.

As noted, the district court purported to dismiss Catherine L. on the basis of her supposed misconduct, *without* regard to the manner in which her views, and possible holdout status, triggered the concerns of other jurors. The Ninth Circuit's opinion expressly condones this approach, stating at one point:

> The only fact that arguably brings this case within *Symington* is that one of the jurors, while being questioned by the district court, volunteered that "[Juror 7] said that [Petitioner] was not guilty and nobody can change--" and "I think the jury is going to be hung up." These statements, which were not solicited by the trial court, should not have been volunteered and could not be a basis for removing the juror. Nevertheless, we think that the district court properly ignored them. Juror 7 was dismissed because of her misconduct and not because of her views on the merits. This case thus evokes none of the concerns we cited in *Symington*. The judge had no occasion to--and did not--inquire into the jurors' motivations for reporting the misconduct or the course of the jury's deliberations. . .

476 F.3d at 1099, App. A, A-8.

As a preliminary matter, in assessing petitioner's claim that his right to a unanimous and impartial jury required by due process and the Sixth Amendment was violated, the Ninth Circuit overlooked a *second* juror statement indicating that dissatisfaction with Catherine's L.'s views on the merits triggered other jurors' misconduct complaints. Again, as set forth above, and prior to Sally L.'s remarks, the foreman himself volunteered, "*One personal concern that I have. We did a mock survey as to where each person stands.*" The foreman then stated, "*[I]t's related to that person [Catherine L.] again,*" and inquired, "*Is having an open mind part of the requirements of deliberating?*" (ER 74).

Furthermore, contrary to the Ninth Circuit's analysis, the district court's refusal to consider whether jurors might have sought Catherine L.'s expulsion based on her substantive views flatly contravenes the analysis required under the Sixth Amendment. Specifically, the record establishes that Catherine was in conflict with several other jurors, and this conflict, at least in part, stemmed from the fact that she had expressed *during deliberations*, in the strongest terms, an initial position that petitioner was not guilty. Comments by at least two fellow jurors strongly suggested that she was already the lone holdout juror for acquittal and they did not believe they could reach a verdict with her continued presence on the jury.[6] Jurors had been personally offended by her talkativeness. Significantly, although information before the district court revealed that she had initiated as many as three contacts with individuals associated with the defense, she

---

[6] During the trial and the court's dismissal inquiry, other jurors raised concerns about keeping the trial "on schedule." (See, e.g. RT 721, ER 84)

also, on at least one or two occasions, did so with those associated with the government. (ER 121, 159) And, though several of these contacts had been observed by fellow jurors earlier, it was only *after* the juror's expression of her opinion on the merits that the jurors reported a contact to the district court. 476 F.3d at 1096-97.

In petitioner's case, there was "considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position opposite to theirs on the merits of the case." *Symington,* 195 F.3d at 1088. Troublesome as it was, the district court could not simply ignore that possibility by professing to disregard the events which gave rise to it. In the absence of such inquiry, the Ninth Circuit's conclusion that "[t]he impetus for the jurors' complaints about Juror 7 was not her willingness to deliberate, but her misconduct outside of the jury room," 476 F.3d at 1098, is not supported by the record, and baseless.

Just as the jurors in *Symington* may well have entertained sincere doubts about the holdout juror's competency, and may well have acted properly in reporting it, so too the jurors in petitioner's case may have been sincere in their concerns about Juror No. 7, and may have acted properly in reporting it. That fact, however, cannot defeat petitioner's claim. It is quite a simple matter to conclude herein, that "it was only because of their disagreement with [the dismissed juror] on the merits that the other jurors had occasion to question her ability to deliberate." *Symington,* 195 F.3d at 1088, n.8. It is that fact that should have been dispositive here.

In light of the foregoing, it was reasonably possible that the impetus for the other jurors' complaints was their desire

to remove an impediment to their returning a guilty verdict against petitioner. *Symington,* 195 F.3d at 1087. The district court erred as a matter of law when it failed to recognize that possibility and dismissed Catherine L. from her service as a juror. The district court's approach in this regard simply cannot be reconciled with *Symington, Brown* and *Thomas.*

II. Certiorari Should Be Granted to Determine Whether it Is Plain Error That Seriously Affects the Fairness, Integrity or Public Reputation of Judicial Proceedings to Fail to Instruct as to the Element of Subscribing to a False Tax Return That a Defendant Acted with the Specific Intent to Violate a Known Legal Duty.

Petitioner also asks this Court to determine whether the failure to properly instruct the jury on the term "wilfully"-- to act with the specific intent to violate a known legal duty -- as an element of a 26 U.S.C. § 7206(1) tax offense,[7] is plain error that seriously affects the fairness, integrity or public reputation of judicial proceedings. As to the false tax return charges set forth in counts one and two, the district court instructed in pertinent part:

> Let me repeat what the first element of making and subscribing to a false tax return is.
>
> On or about the date set forth in the indictment, the defendant made and signed a tax return that he knew

---

[7] 26 U.S.C. § 7206(1) makes it a felony for any person who "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter."

reasonable grounds for belief that his conduct is lawful, it is for you to decide whether the person has acted in good faith in order to comply with the law or whether that person has wilfully made and subscribed to a false tax return.

In determining whether or not the government has proven that the defendant wilfully made and subscribed to false tax returns or whether the *government* [sic] acted in good faith, you must consider all of the evidence received in the case bearing on the defendant's state of mind.

The burden of proving good faith does not rest with the defendant, because the defendant has no obligation to prove anything to you. *The government has the burden of proving beyond a reasonable doubt that the defendant acted wilfully.*

(RT 1601-02) (Emphasis added.)

In addition, as to the count three and four requirement of finding that petitioner "knowingly" made a false statement to a federally insured institution, the district court employed terms virtually identical to those used in the counts one and two "wilfully" instructions.[8/] (RT 1603) (Emphasis added.)

[8/] The term "knowledge" or "knowingly" is used in this instruction. *An act is done knowingly if the defendant is aware of the act and does not act though ignorance, mistake or accident.*

The government is not required to prove that the defendant knew that his acts were unlawful....

Defense counsel did not object to the foregoing instructions.

A. A Violation of 26 U.S.C. § 7206(1) Requires Proof That the Defendant Acted With the Specific Intent to Violate a Known Legal Duty

Firmly established precedent has held for decades that in order to find a "wilful" violation of § 7206 and related criminal tax statutes, a taxpayer must have made a false return not merely with the belief that it is materially false, but also with *the specific intent to violate a known legal duty*. See, e.g., *United States v. Pompiano*, 429 U.S. 10, 12 (1976) (quoting *United States v. Bishop*, 412 U.S. 346, 360 for the observation that "'[t]he Court has . . . recognized that the word 'wilfully' in [section 7206 and related statutes] generally connotes a voluntary, intentional violation of a known legal duty.'"); *United States v. Cheek*, 498 U.S. 192, 210 (1991) ("Wilfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty."); *United States v. Scholl*, 166 F.3d 964, 979-80 (9th Cir. 1999) (citing numerous cases to same effect, and affirming that violation of section 7206 requires the defendant knowing subscribed false return "wilfully, with the specific intent to violate the law"); *United States v. Brooksby*, 668 F.2d 1102, 1104 (9th Cir. 1982)("There can be no doubt that the term 'willful' in § 7206(1) requires proof of a specific intent to do something which the law forbids; more than a careless disregard for the truth is required.)

There can be no serious dispute but that the district court erred in instructing on the false return counts when it told jurors that petitioner acted wilfully if he simply acted knowingly and intentionally and not through ignorance, mistake or accident. That instruction flatly omitted the elemental requirement that defendant have acted with the specific intent to violate a known legal duty, a requirement imposed by a wall of this Court's precedent. Under the instructions, a jury could convict based on a finding that the defendant filed a tax return that he knew did not contain all monies that passed through the bank accounts. The instructions given did not require that the jury also consider whether the government had proven beyond a reasonable doubt that petitioner knew what the law required of him in regard to income reporting yet intended to violate those known legal duties, even though ignorance of those duties was a cornerstone of petitioner's defense.

Nor did any of the district court's remaining instructions cure the omission. While the "good faith" instructions make reference to the defendant's belief in the lawfulness of his conduct, they conclude with language effectively declaring that the government disproves good faith where, again, it simply demonstrates that the defendant acted "wilfully", previously defined as merely acting knowingly and intentionally. (ER 44-45.)

B. The District Court's Omission of the Wilfulness Element of the 26 U.S.C. § 7206 Crimes Was Plain Error That Seriously Affects the Fairness, Integrity or Public Reputation of Judicial Proceedings

In order to achieve a reversal under the plain error doctrine, a defendant must establish (1) that the proceedings below involved error; (2) that the error was plain; and (3) that the error affected the substantial rights of the aggrieved party. *United States v. Olano*, 507 U.S. 725, 732-35 (1993). In addition, the defendant must show that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" before the court of appeal will exercise its discretion pursuant to Fed.R.Crim.P. 52(b) to correct it. *Id.*, at 736.

An error is plain when it is "clear" or "obvious" under the law. *Olano*, 507 U.S. at 734. Given the unanimity with which all federal courts, have treated the wilfulness requirement, as stated by *Pompiano* and related cases, the district court's error was "plain" within the meaning of *Olano*. *See United States v. Alferahin*, 433 F.3d 1148, 1153-54 (9th Cir. 2006)("a district court's error is plain when its jury instructions fail to incorporate an element of the crime that has been clearly established by Ninth Circuit precedent.")

As to the question whether the district court's plain error affected petitioner's substantial rights, here, as in *Alferahin*, petitioner was "not convicted of [the charged crime]"; he was instead "convicted of committing only some of the elements of that crime;" and his due process rights "were unquestionably implicated when his purported conviction

rests on anything less than a finding of guilt as to all elements of the crime." *Id.*, at 1157. This aspect of the instructional error alone bears significantly on the "substantial rights" inquiry. *Id.*

Failure to submit an essential element to a jury relieves the prosecution of its obligation to prove every element beyond a reasonable doubt. *Carella v. California,* 491 U.S. 263, 265 (1989). Depriving the jury of its fact-finding duty thereby violates a defendant's due process right to have each element found beyond a reasonable doubt. *Id.* Failure to instruct on every element is, therefore, constitutional error. *Id.*

> [F]ailure to give an instruction on a required element of the crime is an error that affects substantial rights and one that seriously affects the fairness, integrity or public reputation of judicial proceedings, as required by *Olano,* since due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73 (1970).

United States v. Rogers, 18 F.3d 265, 268 (4th Cir. 1994); *see also United States v. Stansfield*, 101 F.3d 909, 920-921 (3rd Cir. 1996)(omission of essential element constituted plain error and "seriously affect[ed] the fairness" of the trial and satisfied fourth *Olano* step).

While the omission of an element from jury instructions does not always "affect" a defendant's substantial rights and the failure to submit an element to the jury is not *per se* prejudicial, *Neder v. United States,* 527 U.S. 1, 15, 119 S.Ct.

1827 (1999) (holding that "the omission of an element is an error that is subject to harmless-error analysis"), this Court found that the government's evidence "incontrovertibly establishe[d] that Neder's false statements were material" to the charged crimes of tax and bank fraud, and the defendant's attorney did not even argue to the jury or on appeal that it would be possible for a factfinder to conclude that the defendant's false statements were immaterial. *Neder*, 527 U.S. at 16, 119 S.Ct. 1827. *See United States v. Cotton*, 535 U.S. 625, 633 (2002)(evidence was "overwhelming" and "essentially uncontroverted" citing *Johnson v. United States*, 520 U.S. 461, 470 (1997).) In this case, the instructions relieved the government of proving that petitioner submitted his returns with the specific intent of violating a known legal duty. At trial, the primary issues in dispute were the degree, if any, to which petitioner comprehended his obligations vis-a-vis his tax reporting, and the degree to which he relied on others in assessing those obligations. The prosecutor, however, was relieved of the obligation to establish anything as to petitioner's specific intent or knowledge of legal obligations; the trial court's erroneous instructions, bolstered by the prosecutor's closing argument[9/] required only proof that the erroneous numbers were not the product of ignorance, accident, or mistake.

9/ I'm sure [defense counsel] will talk about it. We have to show this return was *wilful. In other words, we have to show Mr. Petitioner knew it was false, knew it was false.* He has to have had knowledge. If you go back there and find he had no knowledge of anything, that this was all a big mistake, he just had no idea what was going on, he is not guilty.

(RT 1624) (Emphasis added.)

The evidence as to the nature and extent of petitioner's understanding of anything having to do with his returns was strenuously contested by both parties throughout the trial. The question of petitioner's actual knowledge of legal duties, and of his specific intent to violate them, were never submitted to, or decided, by the jury; therefore, no reliable decision can be made as to whether the evidence was "overwhelming" on that point.

Nor can any assurance of a finding adverse to petitioner on the element of wilfulness be drawn from the record. The jury's finding that petitioner knew that the disputed returns were in some respect materially false certainly does not establish a specific intent to violate a known legal duty. Petitioner's testimony that he did not understand the significance of signing his returns under penalty of perjury should have weighed in the wilfulness inquiry mandated by *Pompiano*, but it was not resolved by the truncated mens rea inquiry the jury was directed to undertake, i.e., whether petitioner knew the return itself was false.

Here, the government urged that guilty verdicts on the tax counts were in order simply on the basis of a finding that petitioner knew the numbers were off, a state of mind far less culpable than one encompassing specific intent to violate the known legal duty with respect to the tax filings. The jury's verdicts cannot be construed as reliably finding that petitioner acted wilfully, and the evidence supporting that conclusion, particularly given petitioner's credible defense of functional impairment in his reading and writing skills, was hardly overwhelming. The cited instructional omission "seriously affected the fairness, integrity or public reputation of judicial proceedings." That surely occurred in this case where the

primary defense to the false return counts was petitioner's incapacity to understand his returns or to otherwise recognize deficiencies relating to them. Such a defense was absolutely consistent with, and arguably encompassed, a claim that petitioner did not comprehend, much less specifically intend to violate, specific tax law requirements.

A jury may infer knowledge of the law from a defendant's education and expertise. *See Scholl, supra,* 166 F.3d at 979 (citing *United States v. Simon*, 85 F.3d 906, 910 (2nd Cir. 1996)). At trial, it was virtually undisputed that petitioner's schooling and his capacity to understand written materials were extremely limited. That evidence should have guided the jury when assessing whether petitioner grasped the varying reporting obligations that apply in the context of cash accounting as opposed to accrual accounting, an issue addressed at trial. The deficient wilfulness instruction, however, blunted the persuasive impact of all such evidence.

As to the question of fairness, it bears emphasis that the district court's instruction as to what it means to do an act "knowingly," read in the wake of the charge on counts three and four, was not limited to consideration of those counts alone. Counts one and two contain a knowledge requirement and it is likely that when jurors considered whether petitioner knowingly filed false returns, they assumed, erroneously and on the basis of the "knowingly" instruction, that "the government [was] not required to prove that the defendant knew that his acts were unlawful ." (ER 46)

The district court's gravely flawed willfulness instructions rendered petitioner's trial patently unfair and was plain error in a 26 U.S.C. § 7206 prosecution.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit. This Petition for Writ of Certiorari presents important questions impacting federal income tax prosecutions, and the right to a unanimous, impartial jury, under the Fifth and Sixth Amendments to the Constitution. Certiorari should be granted to resolve these important questions.

Dated: August 13, 2007 Respectfully submitted,

ROBERT J. WATERS
Counsel of Record
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Christensen, Glaser, Fink, Jacobs,
Weil & Shapiro, LLP
ROBERT L. SHAPIRO
10250 Constellation Blvd.,19th Fl.
Los Angeles, California 90067
(310) 556-7886

Counsel for Petitioner
HAGOP VARTANIAN

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 05-10581

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

HAGOP VARTANIAN, Defendant-Appellant.

D.C. No. CR-01-05069-OWW

Appeal from the United States District Court for the Eastern District of California, Oliver W. Wanger, District Judge, Presiding.

Argued and Submitted Oct. 18, 2006.
Filed Feb. 28, 2007.

Reported at: 476 F.3d 1095

Before J. CLIFFORD WALLACE, ANDREW J. KLEINFELD, and JAY S. BYBEE, Circuit Judges.

BYBEE, Circuit Judge.

Hagop Vartanian ("Vartanian") appeals his jury convictions for aiding and abetting the filing of a false tax return, in violation of 18 U.S.C. § 2 and 26 U.S.C. § 7206(1), and two counts of aiding and abetting the making of false statements on a loan application, in violation of 18 U.S.C. § 2 and 18 U.S.C. § 1014. On appeal, Vartanian asserts that the district court abused its discretion when it dismissed a juror from service.[FN1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm Vartanian's conviction.

> FN1. We have addressed Vartanian's claims regarding jury instructions and exclusion of witness testimony in an unpublished disposition.

I

In November 2001, a grand jury returned an indictment charging Vartanian with understating the income from his auto sales business, Pacific Sales & Leasing, on his 1994 and 1995 tax returns; with deliberately omitting income from his business, Muscles-N-Motion; and with deliberately omitting income from his illegal bookmaking business. The indictment also charged Vartanian with knowingly making false statements on his 1993 and 1994 tax return for the purpose of obtaining a car loan.

Vartanian's trial began in February 2003, and the jury began deliberations in March 2003. On the second day of deliberations, the trial judge received a note from the jury foreperson stating: "There is one juror that has been seen on different occasions speaking to the defendant's family. Juror's name is Kathy. Three or four people have seen her and two saw her this morning chatting with them outside the courtroom." After discussing the note with counsel for both

sides, the judge decided to interview the juror ("Juror 7") to determine the extent and nature of her contacts with individuals associated with the case.

When questioned about her contacts, Juror 7 stated that she had only exchanged "pleasantries" with people associated with the case, telling them "hi," "it's a nice day," or "[t]hings will be okay." Juror 7 assured the judge she had done nothing more than say hello and did not intend to express her feelings about the case. At that time, Juror 7 also maintained that she made the "[t]hings will be okay" comment to a woman she described merely as dark-haired and present in the courtroom.

After the interview with Juror 7, the judge commented that "[he did]n't have any reason to disbelieve [Juror 7]," but wanted to talk to the foreperson who had raised the initial complaint. Soon after making that comment, however, the judge learned that Juror 7 had spoken to another court official after her interview and informed the official that the woman with dark brown hair was actually Vartanian's sister-a fact she had not stated in her interview.

The trial judge then interviewed the remaining 11 jurors and a person associated with Vartanian whom Juror 7 had approached. In these interviews, the jurors collectively related several instances in which they observed Juror 7's improper contacts: Juror 7 once made a point of taking the elevator alone with people associated with Vartanian's case; Juror 7 deliberately approached Vartanian's family ***1097** and individuals associated with his case and talked with them for "maybe a minute"; while in Starbucks, Juror 7 initiated conversation with defense counsel, Vartanian, and a few other people associated with Vartanian, though she explained to

another juror that she was "just saying hi"; and Juror 7 walked out of the courthouse talking with a blond woman who was present during trial proceedings. One juror added that, while seated at a lunch table, Juror 7 started talking about "Vartanian's eyes and how kind he looked and everything."

Between interviews, defense counsel confirmed that he, Vartanian, and other people associated with Vartanian were ordering coffee, when Juror 7, who was with another juror from the case, called out to them to: "Buy us a coffee too." The judge also interviewed Vartanian's brother's fiancé, a blond woman with whom Juror 7 had been observed speaking, to determine the extent of her contact with Juror 7.

In his interview with each juror, the judge carefully verified that the situation had not affected the juror's ability to remain fair and impartial. Although the trial judge attempted to focus the juror interviews on Juror 7's contact with individuals associated with the case, one breach did occur. During an interview, one juror blurted out that "[Juror 7] said that [Vartanian] was not guilty and nobody can change-" Later, when asked whether Juror 7's conduct "influenced [her] or affected [her] in any way," the same juror also remarked: "Well, I think the jury is going to be hung up."

Following these interviews, the trial judge expressed his concern with Juror 7's behavior. He noted that, at the outset of the case, the jurors were shown a video tape entitled "Called to Serve," which instructed them "not [to] mingle or talk with anyone associated with the case, including the lawyers, the parties, and the witnesses" and not to discuss the case with "other jurors until ... inside the jury deliberation room." The judge emphasized the fact that when confronted

with the allegations, Juror 7 mentioned only one contact and assured the court it was just "casual." However, interviews with the other jurors revealed that Juror 7 had much more extensive contact than she had admitted. The trial judge found that Juror 7 had "not been forthcoming and entirely truthful with the Court" and had "entirely minimized [her contacts]." In addition to the evidence gained through juror interviews, the judge also noted that Juror 7 exhibited other "bizarre" behavior, including "bombard [ing] ... the parties and the Court with notes asking questions" at inopportune times and bringing chocolates to the court reporter and insisting that she take them.

The trial judge found that Juror 7 "expressed solicitude" and "gave assurances" to family members and persons associated with the defendant. He further found that Juror 7 "was not forthcoming, did not disclose all her contacts, and we had to learn about all these contacts from other jurors." Based on his observation of Juror 7's "demeanor" and "explanations," the judge found that "the juror [had] been deceitful and untruthful with the Court" and was "untrustworthy." The trial judge concluded that he was "unwilling to trust [Juror 7] to be a fair and impartial juror" and dismissed her from service.

After two more days of deliberation, the jury found Vartanian guilty on all counts. The court pronounced judgment and sentenced Vartanian to fifteen months in prison and ordered payment of a $10,000 fine. Vartanian filed a timely appeal to this court.

II

[1][2] Federal Rule of Criminal Procedure 23(b) provides that "[a]fter the jury *1098 has retired to deliberate, the court may

permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror." Fed. R. Crim. P. 23(b). "Good cause" encompasses a variety of problems that may arise with respect to the jury, including sickness, family emergency, or misconduct. *See, e.g., United States v. Beard,* 161 F.3d 1190, 1192-93(9th Cir.1998). Because "the district court [is] in the best position to evaluate the jury's ability to deliberate," we generally defer to the district court's good cause determinations. *Id.* at 1194 (internal quotation marks omitted); *see also United States v. Ross,* 886 F.2d 264, 266 (9th Cir.1989). We review a district court's dismissal of a juror during deliberations for abuse of discretion and the district court's factual findings relating to the issue of juror misconduct for clear error. *See United States v. Shryock,* 342 F.3d 948, 973-74 (9th Cir.2003); *Beard,* 161 F.3d at 1193.

Vartanian asserts that the district court should not have dismissed Juror 7 because so long as there is "any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case," the trial judge must either "send the jury back to continue deliberating or declare a mistrial." *United States v. Symington,* 195 F.3d 1080, 1087 (9th Cir.1999). For reasons we explain below, *Symington* does not govern our disposition here.

In *Symington,* the jury complained that one of its members refused to participate in the deliberative process. *Id.* at 1083. The evidence that developed, however, suggested that the jurors' "frustrations with [the reluctant juror] may have derived more from their disagreement with her on the merits of the case." *Id.* at 1084. The issue was what evidentiary standard a district court should use when evaluating the likelihood "that a juror's views on the merits underlies the

request for her removal." *Id.* at 1086. We expressed concern that any inquiry " 'would invite trial judges to second-guess and influence the work of the jury,' " and that the district court might expose jury deliberations to public scrutiny, thereby interfering with "the integrity of the deliberative process." *Id.* (quoting *United States v. Thomas,* 116 F.3d 606, 620 (2d Cir.1997)). In order to preserve these "twin imperatives," we held that if there was "any *reasonable* possibility" that the jurors' complaints stem from the juror's views on the merits then the trial judge has "only two options: send the jury back to continue deliberating or declare a mistrial." *Id.* at 1087. At the same time, we emphasized in *Symington* that "[c]ases subject to this rule ... are infrequent" and that "[i]n general, questions of juror bias or competence focus on 'some event, or ... relationship between a juror and party, that is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process.' " *Id.* at n. 6 (quoting *Thomas,* 116 F.3d at 621).

[3] The impetus for the jurors' complaints about Juror 7 was not her willingness to deliberate, but her misconduct outside of the jury deliberation room. The note that the foreperson sent to the trial judge raised issues of improper contacts suggesting juror bias. The district court carefully interviewed all of the jurors and found that Juror 7, in violation of the court's instructions to the jury,[FN2] had spoken***1099** to members of the defendant's family, defense counsel, and apparently even to the defendant himself. Moreover, the trial judge also found that when questioned, the juror had not been forthcoming about all of her contacts. Some of the jurors' complaints were corroborated by defense counsel and the defendant's brother's fiancé. Under these circumstances, the record amply supports the district court's findings that Juror

7 was "untruthful with the Court" and "untrustworthy." It was thus appropriate and well within the district court's discretion to dismiss Juror 7. *See Shryock*, 342 F.3d at 973-74; *Beard*, 161 F.3d at 1193.

> FN2. Vartanian argues that Juror 7's contacts were not contrary to any instructions given by the court. The record, however, reflects that the trial judge admonished the jury on numerous occasions not to discuss the case with individuals associated with the parties or anyone else and showed the jurors a video tape that instructed them "not [to] mingle or talk with anyone associated with the case, including the lawyers, the parties, and the witnesses" and not to discuss the case with "other jurors until ... inside the jury deliberation room."

The only fact that arguably brings this case within *Symington* is that one of the jurors, while being questioned by the district court, volunteered that "[Juror 7] said that [Vartanian] was not guilty and nobody can change-" and "I think the jury is going to be hung up." These statements, which were not solicited by the trial court, should not have been volunteered and could not be a basis for removing the juror. Nevertheless, we think that the district court properly ignored them. Juror 7 was dismissed because of her misconduct and not because of her views on the merits. This case thus evokes none of the concerns we cited in *Symington*. The judge had no occasion to-and did not-inquire into the jurors' motivations for reporting the misconduct or the course of the jury's deliberations. Juror 7's conduct under investigation was behavior outside of the jury deliberation room. Since the "questions of juror bias or competence" raised here "focus on 'some event, or ... relationship between a juror and party, that

is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process,' " the "rule we announce[d in *Symington*] is not triggered." *Symington,* 195 F.3d at 1087 n. 6 (quoting *Thomas,* 116 F.3d at 621).

III

For the foregoing reasons, the district court did not abuse its discretion when it excused Juror 7 under Rule 23(b). We affirm Vartanian's conviction.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 05-10581

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

HAGOP VARTANIAN, Defendant-Appellant.

D.C. No. CR-01-05069-OWW

Appeal from the United States District Court for the Eastern District of California, Oliver W. Wanger, District Judge, Presiding.

Argued and Submitted Oct. 18, 2006.
Filed Feb. 28, 2007.

Before: WALLACE, KLEINFELD, and BYBEE, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Hagop Vartanian ("Appellant") appeals his conviction for aiding and abetting the filing of a false tax return, in violation of 18 U.S.C. § 2 and 26 U.S.C. § 7206(1), and two counts of aiding and abetting the making of false statements on a loan application, in violation of 18 U.S.C. § 2 and 18 U.S.C. § 1014. The facts and procedural posture of the case are known to the parties, and we do not repeat them here.[FN1]

> FN1. We have addressed Appellant's claims regarding dismissal of a juror in a published disposition. *See* 476 F.3d 1095 (9th Cir.2006).

Appellant contends that two distinct errors-the omission of the willfulness element from the jury instructions and the exclusion of a defense witness's testimony-independently require reversal. Since Appellant did not object at trial to the instructions, we review the jury instructions for plain error. *See United States v. Perez,* 116 F.3d 840, 845-48 (9th Cir.1997) (en banc). We review the exclusion of testimony for abuse of discretion, and we will reverse only where the erroneous evidentiary ruling "more likely than not affected the verdict." *United States v. Pang,* 362 F.3d 1187, 1192 (9th Cir.2004). We reject both of Appellant's arguments.

[1] First, we conclude that the omission of an instruction on one element of the crime was not plain error because it did not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano,* 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The good faith instruction likely compensated for the omission, and the "record contains 'strong and convincing evidence' that the missing element of the crime was adequately proved by the prosecution, such that it is 'extremely unlikely' that a properly instructed jury would not have convicted." *United States v.*

Romm, 455 F.3d 990, 1003-05 (9th Cir.2006) (quoting *Perez*, 116 F.3d at 848); *see also United States v. Lacy*, 119 F.3d 742, 747-48 (9th Cir.1997).

[2] Second, we hold that exclusion of the defense witness did not "more likely than not affect[ ] the verdict" because of the exiguous value of the witness's opinion and the cumulative nature of the government witnesses' testimony to which he was intended to respond.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 05-10581

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

HAGOP VARTANIAN, Defendant-Appellant.

D.C. No. CR-01-05069-OWW

ORDER

Filed May 15, 2007

Before: WALLACE, KLEINFELD, and BYBEE, Circuit Judges.

Judges Kleifeld and Bybee voted to deny the petition for rehearing en banc and Judge Wallace recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed R. App. P. 35.

Appellant's petition for rehearing en banc, filed April 18, 2007, is DENIED.

APPENDIX D

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

26 U.S.C. §7206

Any person who--

(1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written

declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.--Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.--Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.--In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

(A) Concealment of property.--Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.--Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.